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In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE CATHOLIC BISHOP OF CHICAGO,
A CORPORATION SOLE,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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I

The Employers suggest that, despite their schools' admitted impact upon commerce, this Court should interpret the National Labor Relations Act not to apply to private religious schools (Resp. Br. 39-

42).[1] Although they are able to point to nothing in the Act that would support this interpretation, the Employers contend that the Act may not be construed to cover religiously associated institutions absent "an unequivocal and affirmative expression of Congressional intent" (Resp. Br. 41). The authorities relied on do not support such a rule,[2] however, and it would

[1] The Employers did not present this argument in the court of appeals. See *Hankerson* v. *North Carolina*, 432 U.S. 233, 240 n.6 (1977).

[2] The decision in *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963), that the Act does not extend to foreign seamen employed on foreign ships was not based upon a presumption that the statute is inapplicable to a class of employers unless Congress reveals a specific intent to make it applicable. Rather, the Court found explicit indications in the legislative history that the Act was designed solely for the protection of American workers and their employers. 372 U.S. at 19-20. In addition, application of the Act to the maritime operations of foreign flag ships employing alien crews raised a substantial likelihood of international repercussions that Congress would not have invited absent consideration of the problem. Here, on the other hand, the lay teachers employed in respondent's schools are within the class of American working people whose protection the Court found to be central to the Act and, as we show below, the legislative history indicates that Congress considered and rejected an exemption for religiously affiliated employers.

Moreover, there certainly is no presumption that legislation of general applicability does not apply to religiously affiliated organizations. See, *e.g.*, *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir.), cert. denied, 347 U.S. 1013 (1954). When Congress has desired to create exceptions for such organizations, it has done so expressly. See, *e.g.*, 21 U.S.C. 464(a)(3); 26 U.S.C. 501(c)(3); 42 U.S.C. 410(a)(8)(A), (B); 42 U.S.C. 3607.

be at odds with this Court's repeated holdings that Congress "intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause,"[3] as well as with the Act's design of including within its coverage all employers whose operations affect commerce and who are not expressly excluded from the statutory definition of "employer."[4] In any event, the history of the Act clearly evidences Congress' intent to permit the Board to apply the Act to nonprofit employers, including religiously associated employers, should the Board determine that their operations affect commerce sufficiently to warrant the exercise of jurisdiction.[5]

Under the Wagner Act, 49 Stat. 449 *et seq.*, the Board refused to recognize an exemption because of

[3] *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (emphasis in original). Accord, *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 648 (1944); *NLRB* v. *Fainblatt*, 306 U.S. 601, 607 (1939).

[4] Section 2(2) of the Act, 29 U.S.C. 152(2), contains no exclusion for private educational institutions, religiously associated or otherwise.

[5] The Board, in its discretion, has declined to exercise the full measure of its statutory authority, asserting jurisdiction only over those employers whose operations have a substantial impact on commerce. See *Guss* v. *Utah Labor Board*, 353 U.S. 1, 3-4 (1957). In 1959, Congress affirmed the legitimacy of this policy by enacting Section 14(c)(1), 29 U.S.C. 164(c)(1), which provides that the Board "may, by rule of decision or by published rules * * *, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction * * *."

an employer's nonprofit status or religious affiliation.[6] This Court upheld that assertion of jurisdiction in 1944, concluding in the case of a nonprofit fraternal organization which also provided insurance benefits to its members that the Board could "find that [the employer's] cultural and fraternal activities do not withdraw Alliance from amenability to the Wagner Act." *Polish National Alliance* v. *NLRB, supra,* 322 U.S. at 648. See also *Central Dispensary & Emergency Hospital,* 145 F.2d 852, 853 (D.C. Cir. 1944).

In 1947, the Hartley Bill, which passed the House of Representatives, sought to overrule the Board's policy by incorporating into Section 2(2) of the Act an exemption from coverage for all nonprofit organizations qualifying as charities under federal tax law, regardless of their effect on commerce. H.R. 3020,

[6] See *Christian Board of Publication,* 13 N.L.R.B. 534, 537 (1939), enforced, 113 F.2d 678 (8th Cir. 1940) (nonprofit publisher of religious and medical books and pamphlets); *American Medical Association,* 39 N.L.R.B. 385, 386 (1942); *Central Dispensary & Emergency Hospital,* 44 N.L.R.B. 533, 539 (1942), enforced, 145 F.2d 852 (D.C. Cir. 1944), cert. denied, 324 U.S. 847 (1945); *Henry Ford Trade School,* 58 N.L.R.B. 1535, 1536 (1944); *Polish National Alliance,* 42 N.L.R.B. 1375, 1378 (1942), enforced, 136 F.2d 175 (7th Cir.), affirmed, 322 U.S. 643 (1944) (cultural and fraternal organization providing insurance to members); *Associated Press,* 1 N.L.R.B. 788, 790, enforced, 85 F.2d 56 (2d Cir. 1936), affirmed, 301 U.S. 103 (1937) (nonprofit news distribution service). In unpublished decisions, the Board also exercised jurisdiction over the YWCA and the Welfare & Recreation Association. See *Central Dispensary & Emergency Hospital, supra,* 44 N.L.R.B. at 538 n.8.

80th Cong., 1st Sess. § 2(2) (1947), reprinted in *Legislative History of the Labor Management Relations Act, 1947,* at 161-162 (1948) ("1947 Leg. Hist."). The bill reported by the Senate Committee, however, did not contain a provision exempting nonprofit enterprises. When Senator Tydings proposed an amendment from the floor to exempt nonprofit hospitals from the Act because of his concern for their then precarious financial condition, Senator Taft explained that, although he was not opposed to that narrow exemption, it had not been included in the Committee bill in order to avoid "open[ing] up the question of making other exemptions" from the Act. 93 Cong. Rec. 4997 (1947); 1947 Leg. Hist. 1464. No further exemptions were proposed, and the bill that passed the Senate contained only the exemption for nonprofit hospitals.

The Senate version prevailed in conference, and nonprofit hospitals alone were excluded from coverage of the Act. In explaining their concession, the House conferees stated:

> The other non-profit organizations excluded under the House bill are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act.

H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32 (1947); 1947 Leg. Hist. 536.[7]

Thus, there was no suggestion at the time of the 1947 amendments that activities affecting commerce of parochial schools and other nonprofit employers were not within the confines of the Act. Moreover, the Board's contemporaneous construction of these amendments reflected that they merely exempted nonprofit hospitals. In 1950, for example, in asserting jurisdiction over a nonprofit religious organization, the Board stated:

> The Employer asserts that, as it is a nonprofit organization which is engaged in purely religious activities, it is not engaged in commerce within the meaning of the Act. We find no merit in this contention. * * * As this Board and the courts have held, it is immaterial that the Employer may be a nonprofit organization, or that its activities may be motivated by considerations other than those applicable to enterprises which are, in the generally accepted sense, commercial.

The Sunday School Board of the Southern Baptist Convention, 92 N.L.R.B. 801, 802 (1950) (footnote omitted). See also *General Electric Company, Kadlec Hospital*, 89 N.L.R.B. 1247, 1249-1250 (1950).

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[7] The House conferees were of course mistaken as to the Board's practice prior to 1947 respecting the assertion of jurisdiction over nonprofit organizations. See *NLRB* v. *Wentworth Institute*, 515 F.2d 550, 554-555 (1st Cir. 1975); Sherman and Black, *The Labor Board and the Private Nonprofit Employer: A Critical Examination of the Board's Worthy Cause Exemption*, 83 Harv. L. Rev. 1323, 1331-1332 (1970).

To be sure, in *Trustees of Columbia University*, 97 N.L.R.B. 424 (1951), the Board relied upon the Conference Report in declining jurisdiction over clerical employees in the university's libraries. The Board ruled, however, not that it lacked jurisdiction over nonprofit institutions, but rather that it would use the Conference Report as a "guide" (*id.* at 427) to the exercise of its discretion. See *NLRB* v. *Wentworth Institute*, *supra*, 515 F.2d at 555. Indeed, the Board expressly found that "the activities of Columbia University affect commerce sufficiently to satisfy the requirements of the statute and the standards established by the Board for the normal exercise of its jurisdiction" (97 N.L.R.B. at 425), and it observed that it could be inferred from Congress' rejection of the broad exemption for nonprofit organizations in 1947 "that Congress intended to exempt only charitable hospitals and no other nonprofit organizations" (*id.* at 427). The Board nonetheless concluded that, "[u]nder all the circumstances," it would not "effectuate the policies of the Act for the Board to assert its jurisdiction over a nonprofit, educational institution where the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution" (*ibid.*; footnote omitted). Thereafter, in applying this principle, the Board declined jurisdiction over certain other nonprofit employers as well.[8]

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[8] See *Philadelphia Orchestra Association*, 97 N.L.R.B. 548 (1951) (orchestra); *Armour Research Foundation*, 107

The Board changed this policy in regard to nonprofit educational institutions in 1970 because of its finding that colleges and universities were exerting a significant impact on commerce. The Board concluded that it would no longer adhere to the position set forth in *Columbia University* but would now assert jurisdiction over all nonprofit, private colleges and universities that met a specified monetary standard (at present, gross annual revenues of $1 million or more, 29 C.F.R. 103.1). *Cornell University*, 183 N.L.R.B. 329 (1970). The Board subsequently determined that the same considerations and standard were applicable to other nonprofit educational institutions. *Shattuck School*, 189 N.L.R.B. 886 (1971) (nonprofit secondary school). It also again asserted jurisdiction over other nonprofit institutions (except hospitals), irrespective of their religious affiliation. See, *e.g.*, *Drexel Home, Inc.*, 182 N.L.R.B. 1045 (1970); *Bethany Home for the Aged*, 185 N.L.R.B. 191 (1970); *Jewish Orphan's Home*, 191 N.L.R.B. 32 (1971).

In 1974, Congress amended the Act to eliminate the exemption in Section 2(2) for nonprofit hospitals and to establish special procedures for handling labor disputes involving health care institutions. 88 Stat. 395. See *Beth Israel Hospital* v. *NLRB*, No. 77-152

N.L.R.B. 1052 (1954) (laboratory); *Lutheran Church, Missouri Synod*, 109 N.L.R.B. 859 (1954) (radio station). But cf. *Office Employes Union* v. *NLRB*, 353 U.S. 313 (1957) (Board not empowered to decline jurisdiction over labor unions, as a class, when acting as employers).

(June 22, 1978). In doing so, Congress expressly approved the Board's policy of asserting jurisdiction over organizations without regard to their nonprofit status or religious affiliation. Thus, Congress noted that the original Act covered nonprofit organizations including hospitals, that the 1947 amendments exempted only nonprofit hospitals from the Act's otherwise inclusive coverage, and that the Board was currently asserting jurisdiction over other nonprofit organizations. Congress eliminated the hospital exemption because it believed that it was discriminatory to deny employees of nonprofit hospitals the same organizational and bargaining rights enjoyed by employees in proprietary hospitals and in other nonprofit institutions and that extending these rights to nonprofit hospital employees would be likely to lessen labor disputes. See H.R. Rep. No. 93-1051, 93d Cong. 2d Sess. (1974).[9]

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[9] The House Report noted approvingly that "in recent years the Board began to assert jurisdiction over areas it had formerly left alone. Currently, the only broad area of charitable, eleemosynary, educational institutions wherein the Board does not now exercise jurisdiction concerns the nonprofit hospitals, explicitly excluded by section 2(2) of the Act. * * * The bill removes the existing Taft-Hartley exemption in section 2(2) of the Act. It restores to the employees of nonprofit hospitals the same rights and protections enjoyed by the employees of proprietary hospitals and most all other employees." H.R. Rep. No. 93-1051, 93d Cong., 2d Sess. 4 (1974), reprinted in *Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974*, prepared by the Senate Subcommittee on Labor and Public Welfare (1974) ("1974 Leg. Hist."). Similarly Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, criticized the

Moreover, in considering the 1974 amendments the Senate rejected an amendment to exempt nonprofit hospitals operated by religious groups. Senator Cranston, floor manager of the Senate Committee bill and primary opponent of the proposed religious exemption, argued that application of the Act would have no effect on religious teaching or interpretation, that religiously affiliated hospitals are no longer able to recruit solely from their own religious group, but must hire employees from the same labor market as nonsectarian hospitals, and that denying employees of such hospitals the rights extended to similar workers employed by nonsectarian hospitals "would result in a social and economic inequity of the highest magnitude." 1974 Leg. Hist. 133-134. He added:

> [I]n addition, such an exemption for religiously affiliated hospitals would seriously erode the existing national policy which holds religiously affiliated institutions generally such as proprietary nursing homes, residential communities, and educational facilities to the same standards as their nonsectarian counterparts.

1974 Leg. Hist. 137. Senator Cranston remarked in addition that the Committee was also opposed to the

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non-profit hospital exemption as "not only inconsistent with the protection enjoyed by proprietary hospitals and other types of health care institutions, but * * * also inconsistent with the coverage of other nonprofit activities." 1974 Leg. Hist. 95. See also S. Rep. No. 93-766, 93d Cong., 2d Sess. 2-3 (1974), 1974 Leg. Hist. 9-10; 1974 Leg. Hist. 104-105, 372 (Senator Taft), 359 (Senator Williams), 290-291 (Rep. Ashbrook), 295 (Rep. Clay).

proposed religious hospital exemption for fear that, if it were enacted, similar exemptions would be requested "in other areas of activity." 1974 Leg. Hist. 140. These views were supported by Senators Williams and Javits (*id.* at 137-138), and the proposal was defeated (*id.* at 141).

In light of this extensive and unambiguous record, we submit that the court of appeals, in accord with the decision of the First Circuit in *Wentworth Institute*, *supra*, correctly concluded that "the Act, clear on its face, could not be understood to preclude jurisdiction" over educational institutions because of their nonprofit status or religious affiliation (Pet. App. 8a).

II

A. It is unnecessary for this Court to address the contention (Resp. Br. 18-23; Amicus ACLU Br. 7-11) that the Board's jurisdictional standard, which distinguishes between "completely religious" and "religiously associated" schools, violates the First Amendment, since a decision on that issue would not affect the ultimate resolution of this case. As we noted in our opening brief (page 38 n.22), the Board's policy of declining jurisdiction over "completely religious schools" is an exercise of the Board's discretion under Section 14(c)(1) of the Act to decline jurisdiction over a class of employers which the Board's legal jurisdiction would otherwise reach rather than a Board judgment that the Constitution draws a distinction between "completely religious" and other religious institutions. Hence, invalidation

of that policy would not eliminate the Board's jurisdiction over the Employer's schools, but would merely require "the Board * * * to assert jurisdiction over all religious schools in view of the otherwise inclusive scope of the statute under which it operates" (Pet. App. 27a). The Court should therefore refrain from considering the constitutional validity of the Board's distinction between "completely religious" and "religiously associated" schools. See *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 570 (1947); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944).

In any event, there is no substance in the Employers' argument that the distinction drawn by the Board is inconsistent with the First Amendment, since application of the jurisdictional standard does not require any inquiry into either the substantiality or the nature of a school's religious practices. The Board declines jurisdiction only over educational institutions that essentially limit themselves to providing supplementary religious instruction during after school hours and that do not seek to provide an alternative to public school education or to satisfy state compulsory education requirements. *Board of Jewish Education of Greater Washington, D.C.*, 210 N.L.R.B. 1037 (1974); *Association of Hebrew Teachers of Metropolitan Detroit (United Hebrew Schools)*, 210 N.L.R.B. 1053 (1974). The Board asserts jurisdiction over all other schools whose gross revenue meets the $1 million monetary standard, regardless of whether such schools are religiously affiliated or the education provided by the schools is offered with a

religious orientation. See *Roman Catholic Archdiocese of Baltimore*, 216 N.L.R.B. 249 (1975); *Shattuck School, supra*, 189 N.L.R.B. at 886.

This distinction plainly serves to effectuate the policies of the Act. See Comment, 53 Notre Dame Law. 463, 468-469 (1978). Moreover, the distinction does not compel the Board to make any findings regarding a school's religious practices; the fact, objectively ascertainable, that the school seeks to provide an alternative to public education is sufficient to bring it within the Board's discretionary jurisdiction.[10] Thus, as the Employers concede (Resp. Br. 20), despite the large amount of evidence presented below by the Employers in an effort to show the religious content of their schools, the Board evaluated wholly secular considerations in deciding to assert jurisdiction. See Pet. App. 86a-88a.[11]

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[10] If, as the court of appeals suggested (Pet. App. 17a), Catholic schools cannot fall within the "completely religious" category, it is because such schools choose to provide a complete alternative to public education rather than to limit themselves to supplemental religious instruction; it is not, as the Employers suggest (Resp. Br. 22), a result of discrimination among religions.

[11] It should be noted that it was the Employers, not the Board, who insisted upon "plac[ing] the religious content of the Church's schools on trial" (Resp. Br. 18) and that the Hearing Officer's and Union counsel's questions concerning religious subjects (Br. 18-20) represent nothing more than attempts to clarify matters introduced by the Employers. The Hearing Officer's request for a definition of immorality (Br. 18), for example, was merely a restatement of a question asked by the Employers' counsel (A. 39), while the questions about the number of liturgies performed in the schools and the per-

B. The Employers' primary contention (Resp. Br. 23-34) is that the application of the Act to parochial schools would impermissibly entangle the government in religious matters because the Board on occasion might order the reinstatement of a teacher who had been discharged for religious reasons or might order the Employers to bargain about a decision dictated by religious principles. In light of this assertion, it bears repeating, as we emphasized in our opening brief (pages 28-29), that the Board's orders in the instant cases merely require the Employers and the Unions to bargain in good faith about wages, hours, and other terms and conditions of employment and to incorporate any agreement reached in writing. What the Board may do in a future case is wholly conjectural, would be subject to full judicial review at that

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formance of masses in auditoriums (Br. 18-19, 20) were in response to the Employers' attempt to show that the Quigley schools were more religious than other Catholic secondary schools because of the extent of their liturgical program and the presence of chapels in the schools (A. 62-63, 81-82). The Board ignored these religious questions, however, and instead—as the Employers admit (Br. 20)—considered only "the secular aspects of the schools' curricula" in concluding that the schools were not "completely religious."

By the same token, there is no basis for the Employers' contention (Br. 35) that the Board ruled that "the Quigleys are not minor seminaries." The Board merely rejected the Employers' assertion that, since the schools are classified by the Church as minor seminaries, they must fall within the Board's "completely religious" category (Pet. App. 86a). Regardless of how they are designated by the Church, the Quigleys provide an education functionally similar to that offered by other private schools over which the Board asserts jurisdiction.

time, and affords no basis for invalidating the Board's orders here. See *Associated Press* v. *NLRB*, 301 U.S. 103, 131-132 (1937).

This conclusion is not altered by the specific instances of alleged Board entanglement paraded by the Employers (Resp. Br. 25-27), since these cases do not show that applying the Act to parochial schools would lead the Board into disputes over religious matters. Indeed, if these episodes have any probative value it is to illustrate that the types of unfair labor practice charges that are likely to arise in the context of parochial schools are indistinguishable from the sorts of disputes the Board regularly encounters in other settings. In *Diocese of Fort Wayne-South Bend, Inc.*, 230 N.L.R.B. 267 (1977) (Br. 25-26), for example, the Board found that the two teachers whom it had ordered reinstated with back pay were denied a renewal of their contracts, not because they had advocated sexual theories that were contrary to the teachings of the Catholic Church or had refused to structure a religion course as directed by the school principal, but because of their union membership.[12]

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[12] The teachers were the only known union members in their schools, and the school superintendent had stated his intention to get rid of the union adherents a few at a time (230 N.L.R.B. at 269-272). Although, at the Board hearing, the employer attempted to justify the discharge of one of the teachers in part because she had included a text by Masters and Johnson on a suggested reading list, this reason was not among those mentioned at the teacher's separation interview, nor was the teacher informed at that time that her educational

Similarly, in *Roman Catholic Diocese of Brooklyn*, 222 N.L.R.B. 1052 (1976), enforcement denied on other grounds, 549 F.2d 873 (2d Cir. 1977) (Br. 26-27), the Board found that the employer's refusal to hire a teacher was due to his union activity rather than to any alleged misbehavior.[13] And, as the Em-

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or philosophical views were contrary to Catholic teaching (*id.* at 271-273). The employer sought to justify the discharge of the other teacher, who was also the union shop steward, primarily on the basis of the teacher's continual attempts to help resolve grievances or problems for others at the school, actions to which the employer did not object until the teacher acted on behalf of the union (*id.* at 272). Although the employer's counsel mentioned in a letter to a Board agent that the teacher had demonstrated "unwillingness" to structure a course in religion in a particular manner, this contention was later apparently abandoned, since it was mentioned in neither the Administrative Law Judge's decision nor the employer's exceptions to that decision. Moreover, far from considering this teacher unfit to teach in a Catholic school, the employer offered him a job at another Catholic high school after his discharge (*id.* at 273 n.24).

[13] The school principal contended that his decision not to rehire the teacher was based upon misbehavior during the teacher's first year at the school (during which he had gotten good evaluations from his superiors and after which he was rehired for another year) and upon several incidents during his last year of teaching—namely, calling another teacher a "scab" and emphasizing the reality of marriage over its sacramental aspects during a departmental faculty meeting. However, the principal had not heard about these incidents until after the decision not to rehire was made, and he admitted that it was only after the teacher had participated in a strike that he decided that employing the teacher was a mistake (222 N.L.R.B. at 1056-1057). In these circumstances, the Board concluded that the alleged reasons for the refusal to rehire were not the actual reasons but were an "after-the-fact attempt to muster justification" (*id.* at 1057).

ployers note (Br. 27), in *Andrew G. Grutka, Bishop of the Roman Catholic Diocese of Gary, Indiana*, 238 N.L.R.B. No. 216 (1978), petition for review pending, No. 78-2312 (7th Cir., filed Oct. 13, 1978), the allegation that a school official had violated the Act by reading a prayer and a passage of scripture to the employees was dismissed by the Administrative Law Judge because of the General Counsel's failure to sustain his burden of proving that those readings conveyed a promise of benefit or threat of reprisal to cease union activities.[14]

Nor are the Employers on firmer ground in seeking to demonstrate that "the Church's control of [its] schools will inevitably be compromised" (Resp. Br. 31) by the Board's bargaining orders. Again, the Act merely requires the parties to bargain in good faith about wages, hours, and other terms and conditions of employment. They are not obliged to bargain about other subjects and may not be forced to do

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[14] Although the school was forced to participate in a hearing in order to establish the insubstantiality of the allegations, that places it in no different position from any other employer. The First Amendment's protection for religious speech applies to a manufacturer as well as to a clergyman. Yet if a manufacturer were to read a prayer or a passage of scripture to his factory workers in such a manner or context as to convey a threat of reprisal or promise of benefit to deter union activities, no one would doubt that the Board could afford a proper remedy. See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). The employer's motivation and other relevant factors often can be determined only after all of the relevant circumstances have been adduced at a hearing.

so through economic pressure.[15] Furthermore, the duty to bargain in good faith does not require a party to make any concessions or to agree to any substantive contractual provision; if the employer and the union reach a bona fide impasse in negotiations, the employer would be free unilaterally to institute the proposals that he has previously presented to the union. See Section 8(d) of the Act, 29 U.S.C. 158 (d); *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970).

In these circumstances, there is no basis for the Employers' critical assumption that, in order to fulfill their obligation to bargain in good faith, they would have to make concessions, or even bargain about, such matters as "textbook selection, curriculum development and instructional methods" (Resp. Br. 31). Similarly, even if, as the Employers once more speculate, they were someday required to bargain with the Unions about replacing lay faculty with priests or closing a school to free funds to build a new church (Br. 30), it certainly does not follow that they would have to accede to the Union's requests.[16]

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[15] The Board has not yet determined whether or to what extent educational policy issues are a mandatory bargaining subject.

[16] In *Roman Catholic Diocese of Brooklyn*, 236 N.L.R.B. No. 3 (1978) (Resp. Br. 31), the question was whether Ford Central was a successor employer and thus obligated to bargain with the union, which had had an established collective bargaining relationship with the Diocese since it was voluntarily recognized in 1966. The Board found that 21 of the 25 lay teachers hired by Ford Central were from the school's prior faculty (J.D. 37) and that, under settled principles (see *Nazareth Regional High School* v. *NLRB*, 549 F.2d 873, 879-880 (2d Cir. 1977)), the school was a successor employer required to bargain with the union. There was no allegation that Ford Central's cutback of lay teachers in order to employ additional religious teachers was contrary to the Act.

Finally, the Employers are mistaken in asserting that Board jurisdiction over religious schools would entail a "daily interplay among Board agent, union representative and Bishop" (Resp. Br. 29). The Board cannot initiate unfair labor practice proceedings, and its agent's involvement with a school's labor-management relations occurs only upon the filing of a discrete charge or petition. See *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 238 (1967). Moreover, Section 4(a) of the Act, 29 U.S.C. 154(a), prohibits the Board from employing anyone to engage in "conciliation or mediation" of labor disputes. As this Court explained in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937), rather than involving the government in settling labor disputes,

> [t]he theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel.

III

The Employers argue (Resp. Br. 37-38) that exemption of religiously affiliated private schools from the coverage of the Act would have little effect on

commerce and that the Board therefore cannot show a compelling governmental interest justifying the interference with religious practice. Since, in our view, the Board's orders would not require the Employers to take any actions inconsistent with their religious beliefs, it is unnecessary to consider the probable effects on commerce of a judicially-carved exemption for parochial schools. We note, however, that the evidence amply demonstrates that nonpublic schools, including religiously affiliated schools, have a major impact on the national economy.

Since 1950, the private education industry, including the private secondary and elementary school sector, has grown dramatically. Annual expenditures of nonpublic elementary and secondary schools have risen from $240 million in 1940 to some $9 billion in 1977,[17] and the number of teachers employed in such schools has grown from 100,000 in 1946 to 267,000 in 1977.[18] In 1971, religiously affiliated schools accounted for 15,000 of the 18,000 private elementary

[17] U.S. Bureau of the Census, *Statistical Abstract of the United States: 1977*, at 128, table 201 (1977) ("1977 Stat. Abstr."). See also *Cornell University, supra*, 183 N.L.R.B. at 332-333.

[18] 1977 Stat. Abstr. 147, table 237; 1950 Stat. Abstr. 121, table 143; Nonpublic school teachers exceed the number of production employees engaged in manufacturing agricultural machinery (113,000), office machines and computers (110,000), household appliances (111,000), aircraft and aircraft parts (255,000), ships and boats (164,000), radio and television sets (66,000), tobacco products (56,000), or leather products (209,000). 1977 Stat. Abstr. 800-805, table 1376 (1975 figures).

and secondary schools in the United States.[19] Catholic schools alone employ 171,000 teachers, 114,000 of whom are lay teachers.[20]

Accordingly, secular and religious private elementary and secondary schools have a substantial effect on commerce. Moreover, with the increase in teacher employment in such private schools within the last decade there has been an increase in organizational activity[21] and labor disputes[22] among teachers, with

[19] 1977 Stat. Abstr. 145, table 235.

[20] *Official Catholic Directory*, general summary (1978). Four of the 15 largest school systems in the United States are affiliated with the Catholic Church. *Standard Education Almanac* 35-36, 240 (Marquis Academic Media, 1977).

[21] Between 1964 and 1974, membership in the American Federation of Teachers increased by 344,000, to a total of 444,000. 1977 Stat. Abstr. 420, table 682. The increase in organizational activity among parochial school teachers is more recent, coinciding with the increasing employment of lay teachers. Thus, in 1965, less than 36% of the teachers in Catholic elementary and secondary schools were lay teachers (63,000 out of 177,000) (1977 Stat. Abstr. 145, table 234), while by 1978 this percentage had grown to more than two-thirds (114,000 out of 171,000). *Official Catholic Directory*, general summary, at 1-2 (1978).

[22] See Blotzer, *Union-Church struggle in Pittsburgh strike*, National Cath. Reporter, Sept. 9, 1977, at 14; *1978 Catholic Almanac* at 602, (Our Sunday Visitor, Inc.); Petosa, *L.A. Catholic teachers threaten strike, boycott*, National Cath. Reporter, Apr. 30, 1976, at 1; *Philadelphia lay teachers overrule leadership, accept offer, end strike*, National Cath. Reporter, Sept. 24, 1976, at 4; *1976 Catholic Almanac*, at 54, 100, 193 (Our Sunday Visitor, Inc.); Barozzi, *Long teachers' strike expected in Brooklyn*, National Cath. Reporter, Oct. 12, 1973, at 18; Hyer, *N.Y. strike ends where it started*, National Cath. Reporter, Jan. 7, 1972, at 1; *Nearly 1,000 teachers strike*

the consequent disruptions to commerce and to the economy that Congress sought to avoid. It therefore serves an undeniably substantial public interest to afford parochial and other private school teachers the protections of the Act.[23]

IV

In sum, the essential question in this case is whether the First Amendment gives religious organizations a "special immunity from the application of general laws" and a "special privilege to invade the

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N.Y. archdiocese, National Cath. Reporter, Dec. 3, 1971, at 1; *San Francisco strike on, id.* at 2; *Teachers strike*, National Cath. Reporter, Aug. 21, 1970, at 2; *1971 Catholic Almanac*, at 56 (Our Sunday Visitor, Inc.); *Union agrees to binding arbitration in strike at Chicago Catholic school*, National Cath. Reporter, May 1, 1968, at 9; *School fires 23 teachers*, National Cath. Reporter, May 17, 1967, at 1; *Catholic School Teachers Picket*, America, May 13, 1967, at 711.

[23] The Employers' reliance on *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (Resp. Br. 36-37) is misplaced. In that case the Court held that the Tenth Amendment barred Congress, in the exercise of its commerce power, from prescribing minimum wages and maximum hours for state employees providing essential state services, because such regulation "would impair the states' 'ability to function effectively in a federal system'" (*id.* at 852). It goes without saying that the Employers are not sovereign entities comparable to state governments. Moreover, the concerns underlying the Free Exercise and Establishment Clauses are unrelated to the problems of dual sovereignty that formed the basis for the decision in *National League of Cities*. To the contrary, it has consistently been held that the First Amendment does not provide enterprises with total immunity from governmental regulation simply because they engage in an activity protected by the Amendment. See, *e.g.*, *Oklahoma Press Co.* v. *Walling*, 327 U.S. 186, 194 (1946); *Associated Press* v. *NLRB*, *supra*.

rights and liberties of others" (*Associated Press* v. *NLRB*, *supra*, 301 U.S. at 132-133) that it does not provide to the press. Under settled principles, this question must be answered in the negative.

When a religiously affiliated organization chooses to engage in an enterprise that affects commerce, it must accept the same obligation to respect laws enacted for the protection of societal interests that is imposed on similar enterprises not having a religious affiliation. *King's Garden, Inc.* v. *FCC*, 498 F.2d 51, 60 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974). The Religion Clauses of the First Amendment do not preclude individuals, because of their affiliation with religious institutions, "from receiving the benefits of public welfare legislation." *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947). While civil courts and administrative agencies must take care not to inquire "whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations * * *" (*Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 713 (1976)), these considerations do not deprive such courts and agencies of jurisdiction over "purely secular disputes between third parties and a particular defendant, albeit a religious[ly] affiliated organization" with respect to civil, rather than church, law. *See General Council on Finance and Administration of The United Methodist Church* v. *Superior Court of California*, No. A-200 (Sept. 1, 1978) (Rehnquist, Circuit Justice).[24]

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[24] Amicus United States Catholic Conference's contention that hierarchical churches, in order to maintain their "insti-

CONCLUSION

For these reasons, as well as the reasons set forth in the Board's opening brief, the judgment of the court of appeals should be reversed and the case remanded with directions to enforce the Board's orders.

Respectfully submitted.

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tutional integrity" (Br. 10), must have a right under the First Amendment to determine for themselves what laws they may be required to obey is contrary to the established principle that

> [a]lthough a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.

Wisconsin v. *Yoder*, 406 U.S. 205, 215-216 (1972) (footnote omitted).

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